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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 16, 2022 Session

STATE OF TENNESSEE v. AMBRUS GAY

Appeal from the Criminal Court for Knox County
No. 114913 Kyle A. Hixson[1], Judge

No. E2021-01418-CCA-R3-CD

Defendant, Ambrus Gay, was charged in a five-count indictment with two counts of aggravated robbery, two counts of aggravated assault, and one count of robbery. The case proceeded to a jury trial. At the conclusion of the proof, the trial court partially granted Defendant's motion for judgment of acquittal, reducing the robbery charge to the lesser-included charge of theft. The jury found Defendant guilty as charged on all counts, and the trial court imposed an effective 10-year sentence. In this appeal as of right, Defendant contends: 1) the trial court should have suppressed his confession based on a violation of his *Miranda* rights; 2) the trial court should have suppressed his confession because it was not voluntarily made; 3) the trial court erred by denying Defendant's motion to sever the offenses; and 4) the evidence was insufficient to support his aggravated robbery convictions because he had completed the thefts prior to producing a weapon. Discerning no reversible error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which ROBERT H. MONTGOMERY, JR., and JOHN W. CAMPBELL, SR., JJ., joined.

Eric Lutton, District Public Defender, and Jonathan Harwell, Assistant Public Defender (on appeal); and David Skidmore, Assistant Public Defender (at trial), Knoxville, Tennessee, for the appellant, Ambrus Gay.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Charme P. Allen, District Attorney General; and Nate Ogle, Assistant District Attorney General, for the appellee, State of Tennessee.

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[1] Knox County Criminal Court Judge Bob R. McGee presided over the hearing on Defendant's motion to sever and motion to suppress his statement.

OPINION

Facts and Procedural History

The offenses in this case arose from a series of purchases arranged through Facebook Marketplace, wherein the sellers agreed to meet Defendant, who used the alias Facebook profile name, "Devontavis Street Trillest." Once at the meeting location, Defendant would then steal the sellers' property.

Pretrial Motions

Prior to trial, Defendant filed a motion to sever the offenses and a motion to suppress his statement to police. Following a hearing, the trial court denied both motions. The record does not contain a written order denying either motion, and the trial court's oral findings and conclusions are minimal.

In his motion to sever, Defendant argued that evidence of all three offenses introduced at a single trial would be impermissible propensity evidence. The State responded that proof of each offense was necessary to establish identity. The trial court denied Defendant's motion, finding that Defendant's identity was "highly probative" and that the danger of unfair prejudice was not outweighed by the probative value of the victims' identification of Defendant as the perpetrator.[2]

In his motion to suppress his confession given during an interview with the Knoxville Police Department ("KPD"), Defendant argued that the investigators asked him about his Facebook pseudonym before advising him of his *Miranda* rights. Defendant argued that the entirety of the interview should be suppressed as "fruit of the poisonous tree." Defendant also challenged the voluntariness of the statement based on Defendant's age and intelligence. He argued that officers made "a series of shouting statements that tended to override [his] decision not to admit his complicity" in the offenses.

At the hearing on Defendant's motions, KPD Investigator Thomas Thurman testified that he and Investigator Chad Madison interviewed Defendant after his arrest on August 15, 2018. Defendant was 19 years old at the time of the interview. Investigator

[2] As discussed below, during the hearing on the motion to sever, the State incorrectly argued that the joinder of offenses was "mandatory." The record does not indicate whether the trial court denied Defendant's motion pursuant to Rule 14(b)(1) or (b)(2) of the Tennessee Rules of Criminal Procedure.

Thurman testified that he did not have concerns about Defendant's mental capacity. The interview lasted for approximately two and one-half hours.

A video recording of the interview was admitted as an exhibit to the hearing. The video shows that Investigator Thurman asked Defendant a series of preliminary questions, including his name, date of birth, what name he went by "on the streets," his height and weight, the names and ages of his siblings, his last employment, his address, and his prior criminal history. Investigator Thurman then asked Defendant about his social media presence. He asked what his Facebook profile name was, and Defendant answered, "Devontavis." Investigator Thurman asked for a middle and last name, and Defendant replied that "Devontavis" was his "whole" name. The following exchange then occurred:

> Investigator Thurman: That's not all of your tag. That's just one name. What else you got on there?
> Investigator Madison: More on there, come on now, don't lie to us.
> Defendant: I'm not lying.
> Investigator Thurman: I just looked at it. I just looked at your Facebook tag. Why you got to lie. I checked your Facebook tag. It's social media. Sh** why you got to lie, it's just Facebook.
> Defendant: What it say?
> Investigator Thurman: What do you mean what did it say? You tell me. I looked at it.
> Defendant: Yeah.
> Investigator Thurman: What did it say?
> Defendant: I'll be forgetting my name. I – I don't be on Facebook.
> Investigator Thurman: You may have changed it recently. I seen how long you changed it – it's been that way for a little bit. You got – you know you got to establish your face.
> Defendant: Yeah.
> Investigator Thurman: So just tell me what your Facebook is. That's how I just make sure you're telling me the truth.
> Defendant: Yeah, I got to get my phone, I forgot it.
> Investigator Thurman: Okay.
> Defendant: It's Devontavis.
> Investigator Thurman: But it's Devontavis something.
> Defendant: Yeah, Devontavis something.

Investigator Thurman told Defendant, "they [other officers] brought you up here to me. You know, you . . . I don't know much about that. What – they just roll up on you and take you or what?" Defendant replied that he "was trying to sell a phone." Investigator

Thurman then said, "It's a good time to talk about your rights." He advised Defendant of his *Miranda* rights and read him a waiver form, which Defendant signed.

At the suppression hearing, Investigator Thurman acknowledged that he asked Defendant about his Facebook pseudonym before advising Defendant of his *Miranda* rights. He stated, "Usually before an interview ever starts, we try to identify social media profiles linked up to the persons that we're investigating." However, he agreed that in this case, it was "legally significant information" because the Facebook account "had show[n] up, obviously, multiple times in this set of cases."

During the interview, Defendant denied any involvement in the incidents. Investigator Madison showed Defendant a screenshot of his Facebook profile and said, "you and I both know that's you." Investigators confronted Defendant with the victims' statements and identifications of him. Investigator Thurman asked about Defendant's girlfriend. He pressed Defendant about whether he kept a gun at his girlfriend's apartment. Defendant denied that he had any guns, and Investigator Thurman told Defendant to "come clean" or Defendant would "make a whole mess for everyone in [his] circle." Investigator Madison explained to Defendant that one of the victims claimed that he shot at her during the robbery and that "there is a huge difference between shooting in the air and shooting at somebody." Investigator Madison then told Defendant that attempted murder was a Class A felony, which was "not probatable," and that aggravated robbery was a Class B felony.

At the suppression hearing, Investigator Thurman denied threatening to "make trouble for everyone in [Defendant's] circle if he did not confess." Investigator Thurman testified that he "made sure [Defendant] understood the nature of the firearm that was located and the problems that that could pose for the people in his life that he probably doesn't want those problems to . . . happen to."

Defendant's father, Malcolm Williams, testified that Defendant had a psychological evaluation at age 18 to determine his eligibility to continue receiving Social Security Disability benefits. The evaluation stated that Defendant fell into the "extremely low range of intellectual functioning." Mr. Williams described Defendant as "[c]onstantly depressed" and stated that he had been suicidal before. Mr. Williams did not believe that Defendant fully understood the consequences of his actions.

Addressing Defendant's *Miranda* claim, the trial court noted that the "State has the right to find out who you are, to ask you directly, and *Miranda* does not apply." The court also stated, "[A]s soon as they did get the identification issue worked out and knew who they were talking to, they did *Mirandize* him at that time." Turning to the voluntariness of Defendant's confession, the trial court found that "[t]here were certainly no threats of violence or anything crass like that." The court found that "[D]efendant voluntarily stayed

engaged in the conversation and ultimately became convinced that they had him and he might as well cooperate." The court concluded that Defendant's constitutional rights were not violated and denied the motion to suppress.

Evidence at Trial

Karen Letteer testified that she arranged through Facebook Marketplace to sell an Apple watch to a person whose account profile name was "Devontavis Street Trillest," whom Ms. Letteer later identified in a photographic lineup and at trial as Defendant. Ms. Letteer agreed to meet Defendant on June 12, 2018, at Sarah Moore Greene Elementary School, and they agreed on a price of $150 for the watch. Defendant approached Ms. Letteer's car and "put his whole body in the side of the car, like, like he didn't want [her] to get out." Ms. Letteer handed the watch to Defendant for him to examine it. Defendant then took the dock and charger for the watch from Ms. Letteer and "took off running" without paying.

Shelby Lee Thornton testified that she arranged through Facebook Marketplace to meet a buyer whose account profile name was "Davontavis Street Trillest" on July 19, 2018, at Sarah Moore Greene Elementary School. She had listed an iPhone for sale for $750. Ms. Thornton identified Defendant as the person with whom she communicated on Facebook about the sale. When she arrived, Defendant approached her car and asked to see the cell phone. Ms. Thornton testified that Defendant "was looking through it for a couple of minutes[,]" while Ms. Thornton and her passenger "were just kind of making small talk[.]" She testified, "[T]wo or three minutes after, [Defendant] pulled a weapon." Ms. Thornton described it as a "black and silver handgun." Defendant pointed the gun at Ms. Thornton and her passenger and demanded their money. Ms. Thornton opened her wallet and told Defendant she had only "two or three dollars[,]" and Defendant told her not to "worry about that, and then told [them] to leave." As Ms. Thornton drove away, she heard two gunshots.

William Brakebill was the passenger in Ms. Thornton's car. Mr. Brakebill identified Defendant as the person pictured in the Facebook profile "Devontavis Street Trillest," with whom Ms. Thornton had communicated about selling her iPhone. When they arrived at the school, Defendant approached the car and asked to see the phone. While Defendant examined the phone, Mr. Brakebill and Ms. Thornton "were chatting, killing time." Defendant then "reached back" for what Mr. Brakebill assumed was money to pay for the phone, and Defendant produced a gun. Mr. Brakebill described it as a black revolver with a silver slide. Defendant demanded their money, and Mr. Brakebill replied, "Dude, you were supposed to bring the money." Defendant then demanded, "Drive before I start shooting." As they drove away, Defendant "fired a round either into the air or into the

ground." Mr. Brakebill estimated that Defendant held the phone for "two to five minutes" before pulling out the gun.

Shayna Gotay Johnson testified that she had arranged to sell her iPhone to "Devontavis Street Trillest" through Facebook Marketplace. They agreed on a price of $420 and arranged to meet at the Studio Apartments at 8:30 p.m. on August 11, 2018. Ms. Johnson identified Defendant as the person she met to sell the phone. She testified that Defendant approached her and asked to look at the phone. Defendant stated that he did not have the agreed upon amount of cash with him and asked Ms. Johnson to drive him to his home to get more money. Ms. Johnson declined his request but told Defendant that she would wait there for him to return. Defendant left and returned 15 minutes later. He asked to look at the phone again, and Ms. Johnson became "a little suspicious just because it was taking so long, [and] his eyes were constantly shifting[.]" Ms. Johnson walked to the front of the apartment complex office to position herself in front of the security cameras. Defendant continued to stall. Ms. Johnson twice asked for her phone back and pulled out her pepper spray. Defendant then pulled out a gun, which Ms. Johnson described as a silver gun with a black handle. Ms. Johnson turned around, and Defendant ran away with the phone. On cross-examination, Ms. Johnson testified that Defendant had been holding the phone for about five minutes prior to pulling out his gun, and she agreed that Defendant did not take anything from her at gunpoint. She also testified that Defendant did not fire the gun.

KPD Officer Amy Boyd became involved in an investigation of Defendant in August 2018. Investigators arranged to purchase an iPhone from Defendant through the Facebook profile "Devontavis Street Trillest" for the purpose of arresting him. Officer Boyd, driving an unmarked vehicle, met Defendant at the Weigel's store on Summit Hill Drive on August 15, 2018. When Defendant arrived, KPD officers took him into custody. KPD Officer Mark Taylor had observed Defendant leaving the Pinnacle Park Apartments prior to the arranged buy. After Defendant's arrest, Officer Taylor and another officer searched the apartment occupied by Defendant's daughter's mother, who stated that Defendant had just left the apartment. Officers found a handgun in a child's bedroom. Ms. Johnson, Ms. Thornton, and Mr. Brakebill identified the handgun as the one Defendant had pointed at them. Officer Taylor testified that he was aware that "Devontavis Street Trillest" was an alias and that he knew Defendant's actual identity.

Defendant did not testify or present any evidence. Following the proof, the trial court partially granted a motion for judgment of acquittal and reduced the robbery charge against Ms. Letteer to the lesser included offense of theft. The jury found Defendant guilty as charged on all counts. Following a sentencing hearing, the trial court imposed an effective sentence of 10 years. This timely appeal followed the denial of Defendant's motion for new trial.

Analysis

On appeal, Defendant contends that the trial court erred by denying his motion to suppress his statement to police, that the trial court erred by not severing the offenses, and that the evidence at trial was insufficient to support his aggravated robbery convictions.

Admissibility of Defendant's Statement

On appeal, Defendant raises two issues concerning his statement to police: first, that police elicited incriminating information about Defendant's identity as the owner of the alias Facebook account before advising him of his *Miranda* rights; and second, that his statement was coerced and therefore not voluntary.

The State argues that Defendant has waived consideration of the *Miranda* issue by failing to include it in his motion for new trial. Tennessee Rule of Appellate Procedure 3(e) treats issues "upon which a new trial is sought" as waived "unless the same was specifically stated in a motion for a new trial." Although Defendant challenged the admissibility of his statement under both *Miranda* and on the ground that it was involuntary in his pretrial motion to suppress, in his motion for new trial, Defendant raised only the issue of the voluntariness of his confession and did not preserve the issue of a *Miranda* violation. As such, we review the *Miranda* issue solely for plain error. *See State v. Maynard*, 629 S.W.2d 911, 912 (Tenn. Crim. App. 1981) (holding that failure to raise suppression issue in a written motion for new trial waives the right to present the issue on appeal). The doctrine of plain error applies when all five of the following factors have been established:

> (a) the record must clearly establish what occurred in the trial court;
> (b) a clear and unequivocal rule of law must have been breached;
> (c) a substantial right of the accused must have been adversely affected;
> (d) the accused must not have waived the issue for tactical reasons; and
> (e) consideration of the error must be "necessary to do substantial justice."

State v. Page, 184 S.W.3d 223, 230-31 (Tenn. 2006) (quoting *State v. Terry*, 118 S.W.3d 355, 360 (Tenn. 2003)) (internal brackets omitted). "An error would have to [be] especially egregious in nature, striking at the very heart of the fairness of the judicial proceeding, to rise to the level of plain error." *Id*. at 231.

Here, the record clearly established what occurred in the trial court. Defendant challenged the admissibility of his statement under *Miranda* in a pretrial motion, and

evidence was presented at a suppression hearing. The State argues that no clear and unequivocal rule of law was breached because the investigators' question to Defendant about his Facebook account name falls under the "routine booking questions" exception, "which exempts from *Miranda*'s coverage questions to secure the 'biographical data necessary to complete booking or pretrial services[.]'" *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990). The *Muniz* Court held that, so long as the questions were not designed to elicit incriminating information, officers do not have to give prior *Miranda* warnings. *Id*. The trial court found that investigators gave Defendant *Miranda* warnings "as soon as they did get the identification issue worked out and knew who they were talking to[.]" However, Investigator Madison confronted Defendant multiple times throughout the interview with a screenshot of the Facebook profile, stating, "you and I both know that's you." Investigator Thurman acknowledged at the suppression hearing that the Facebook account name was "legally significant information" because it had "had show[n] up, obviously, multiple times in this set of cases."

Nevertheless, even if police elicited incriminating information before obtaining Defendant's waiver of his *Miranda* rights, plain error relief is not warranted because Defendant cannot show that the evidence adversely affected a substantial right or that consideration of the alleged error is necessary to do substantial justice. The record contains overwhelming evidence of Defendant's guilt, including all three victims' identifications of Defendant as the person whose Facebook profile was the alias name "Devontavis Street Trillest."

"'[I]n the ordinary case,' the Supreme Court has explained, to establish that an error 'affected the defendant's substantial rights . . . means he or she must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" *State v. Martin*, 505 S.W.3d 492, 505 (Tenn. 2016) (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016). In cases where the defendant seeks plain error review, it is the defendant's burden to show prejudice. *Id*. (citing *Molina-Martinez*, 578 U.S. at 206 (Alito, J., concurring).

We conclude that the trial court's admitting the portion of Defendant's statement prior to Defendant's waiving his *Miranda* rights did not influence the jury's verdict. Defendant is not entitled to relief on this basis.

Defendant also asserts that his confession was not voluntary due to threats or promises made by the interviewing investigators. The Tennessee Constitution protects persons against compelled self-incrimination: "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. This Court has concluded that "the test of voluntariness for confessions under Article I, [section] 9 is broader and more protective of individual rights than the test of voluntariness under

the Fifth Amendment" of the United States Constitution. *State v. Crump*, 834 S.W.2d 265, 268 (Tenn.1992) (citing *State v. Smith*, 834 S.W.2d 915 (Tenn.1992)).

To be considered voluntary, a statement must not be the product of "any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *State v. Smith*, 42 S.W.3d 101, 109 (Tenn. Crim. App. 2000) (quoting *Bram v. United States*, 168 U.S. 532, 542-43 (1897)). A defendant's subjective perception is insufficient to establish the existence of an involuntary confession. *Id*. The essential inquiry is "whether the behavior of the State's law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined[.]" *State v. Kelly*, 603 S.W.2d 726, 728 (Tenn. 1980) (quoting *Rogers v. Richmond*, 365 U.S. 534, 544 (1961)). A confession is involuntary if it is the product of coercive state action. *See, e.g., Colorado v. Connelly*, 479 U.S. 157, 163-64 (1986). "The State has the burden of proving the voluntariness of the confession by a preponderance of the evidence." *State v. Willis*, 496 S.W.3d 653, 695 (Tenn. 2016).

In determining whether a confession is voluntary, a trial court examines the totality of the circumstances, which encompasses "both the characteristics of the accused and the details of the interrogation." *State v. Climer*, 400 S.W.3d 537, 568 (Tenn. 2013) (quoting *Dickerson v. United States*, 530 U.S. 428, 434 (2000)). Relevant circumstances include the following:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated[,] or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

State v. Huddleston, 924 S.W.2d 666, 671 (Tenn. 1996) (quoting *People v. Cipriano*, 429 N.W.2d 781, 790 (1988)).

A trial court's findings of fact on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Questions about the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Id*. at 23. The prevailing party is entitled to the "strongest legitimate

view of the evidence and all reasonable and legitimate inferences drawn from that evidence." *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998); *see State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001). A trial court's application of the law to its factual findings is a question of law and is reviewed de novo on appeal. *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997). In reviewing a trial court's ruling on a motion to suppress, this Court may consider the trial evidence as well as the evidence presented at the suppression hearing. *See State v. Henning*, 975 S.W.2d 290, 297-99 (Tenn. 1998); *see also State v. Williamson*, 368 S.W.3d 468, 473 (Tenn. 2012).

Applying the law to the facts of this case, the 19-year-old Defendant was advised of his constitutional rights and executed a waiver. Defendant was not injured, intoxicated, or drugged when he gave the statement, and he was not deprived of food, sleep, or medical attention. Officers did not physically abuse or threaten Defendant with physical abuse. Defendant was responsive to the officer's questions throughout the interview. Defendant relies on "essentially undisputed [evidence] as to [Defendant]'s intellectual capacity. However, Investigator Thurman testified that he did not have any concerns about Defendant's mental capacity, and the report introduced into evidence by Defendant states that Defendant "more likely falls into the borderline range of intellectual functioning." Taken together, the relevant considerations support the trial court's conclusion that Defendant's confession was voluntary.

Defendant argues that his confession was the result of coercion because law enforcement threatened that his girlfriend would be in legal jeopardy if he did not confess. Investigator Thurman explained his comment to Defendant that there would be a "mess" for "everybody in your circle" as a statement to "ma[k]e sure [Defendant] understood the nature of the firearm that was located and the problems that that could pose[.]"

Defendant also argues that officers made an implied promise of leniency when they told Defendant that he could help himself by admitting that he fired his gun merely to scare the victims rather than in an attempt to kill them. Defendant argues that this statement was misleading because Ms. Thornton did not claim that the shots were fired at her. Defendant points to the officer's statement that aggravated robbery is a "probatable" offense and attempted murder is not, and Defendant seems to assert that this statement was a promise of probation in exchange for his cooperation. We disagree.

Looking at the totality of the circumstances and the evidence, we cannot conclude that the investigators' behavior was enough to overbear Defendant's will to resist. Defendant continued to deny his involvement throughout the interview, even during the interactions about which he complains, before he ultimately confessed. We conclude that Defendant's statement was voluntary. Defendant is not entitled to relief on this issue.

Severance

Defendant asserts that the trial court erred in denying his motion to sever the offenses by date, arguing that the offenses were not part of a common scheme or plan and that evidence of one offense would not have been admissible in a trial on the other offenses. The State responds that the trial court did not err and that any error would be harmless. We conclude that the trial court's denial of Defendant's severance motion was error, but that the error was harmless.

When two or more offenses are joined in the same indictment, as in this case, a defendant may contest the joinder by filing a motion to sever the offenses. A defendant is entitled to a severance under Tennessee Rule of Criminal Procedure 14(b)(1) "unless the offenses are part of a common scheme or plan and the evidence of one would be admissible in the trial of the others." Tenn. R. Crim. P. 14(b)(1). In ruling on a severance motion, the trial court must consider the evidence and arguments presented at the hearing and determine whether: (1) the offenses constitute parts of a common scheme or plan; (2) evidence of one of the offenses is relevant to a material issue in the trial of the other offenses; and (3) the probative value of the proof regarding the other offenses is not outweighed by the prejudicial effect of the admission of the evidence. *State v. Dotson*, 254 S.W.3d 378, 387 (Tenn. 2008). On appeal, "decisions to consolidate or sever offenses pursuant to Rules 8(b) and 14(b)(1) are to be reviewed for an abuse of discretion." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999).

Offenses forming part of a common scheme or plan fall into one of three categories: "(1) offenses that reveal a distinctive design or are so similar as to constitute 'signature' crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction." *Shirley*, 6 S.W.3d at 248 (citing Neil P. Cohen et al., *Tennessee Law of Evidence* § 404.11, at 180 (3d ed. 1995)).

In this case, neither the State nor the trial court specified the bases upon which they relied to establish a common scheme or plan. The State points to defense counsel's concession at the hearing on Defendant's motion to sever that "this was an ongoing criminal enterprise" and argues that Defendant is therefore "precluded from making the argument that the offenses 'were not part of a common scheme[.]'" We disagree with the State that an "ongoing criminal enterprise" constitutes a "common scheme or plan."

When offenses are alleged to be part of a larger, continuing plan or conspiracy, the prosecution must present proof of "'a working plan, operating towards the future with such force as to make probable the crime for which the defendant is on trial.'" *State v. Prentice*, 113 S.W.3d 326, 331 (Tenn. Crim. App. 2001) (quoting *State v. Hoyt*, 928 S.W.2d 935,

943 (Tenn. Crim. App. 1995), *overruled on other grounds by Spicer v. State*, 12 S.W.3d 438, 447 n.12 (Tenn. 2000)).

"[A] larger, continuing plan or conspiracy 'involves not the similarity between the crimes, but [rather] the common goal or purpose at which they are directed.'" *State v. Denton*, 149 S.W.3d 1, 15 (Tenn. 2004) (quoting *Hoyt*, 928 S.W.2d at 943); *see State v. Hallock*, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993). The offenses may not be simply a string of similar crimes, but must be committed "in furtherance of a plan that has a readily distinguishable goal." *Denton*, 149 S.W.3d at 15. In other words, the plan must operate towards the future "'with such force as to make probable the crime for which the defendant is on trial.'" *Prentice*, 113 S.W.3d at 331 (Tenn. Crim. App. 2001) (quoting *Hoyt*, 928 S.W.2d at 943). A shared motivation for two otherwise unrelated crimes is not sufficient, but "[e]ach of the consolidated offenses must serve to further the goal or plan in existence at the time of the commission of the first offenses." *State v. Timothy Leron Brown*, No. M2017-00904-CCA-R3-CD, 2019 WL 1514551, at *28 (Tenn. Crim. App. Apr. 8, 2019), *perm. app. denied* (Tenn. Aug. 15, 2019); *see also* Neil P. Cohen et al., *Tennessee Law of Evidence* § 4.04[12][c] (6th ed. 2005) ("[t]he unifying concept of crimes admitted under this theory is not their high degree of similarity but the common goal or purpose toward which each crime is directed").

We cannot conclude that the offenses in this case were committed in furtherance of a larger, continuing plan or conspiracy, nor can we conclude that they were so unique and distinctive that they constitute "signature" crimes. Clearly, the offenses were not part of the same criminal transaction, as they were committed weeks apart from each other.

Turning to the question of whether evidence of one offense would be admissible at the trial of the others, the trial court, at the State's urging, determined that proof of the other offenses was necessary to establish Defendant's identity as "Devontavis Street Trillest." Whether evidence of one would be admissible at the trial of the others is analyzed under Tennessee Rule of Evidence 404(b), which provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait." However, such evidence may be admissible "for other purposes," including identity. Tenn. R. Evid. 404(b).

Here, each victim separately identified Defendant as the person who used the alias Facebook profile and as the person who stole from them. The State argues that because Defendant "repeatedly told officers during his interview that a friend had access to that profile, it was critical for the State to connect [D]efendant to that profile." However, Defendant was arrested during a "sting," whereby police had arranged to purchase an iPhone from "Devontavis Street Trillest" through Facebook Marketplace. This "sting"

evidence could have been introduced at each of the trials of the separate offenses to prove Defendant's identity.

Based upon the evidence in the record, the identity of Defendant was never in question. Thus, the record does not support, for any purpose, the admission of proof of the three separate offenses, committed on three separate dates, involving separate victims, at different locations, in the trial of the others, in satisfaction of Tennessee Rule of Criminal Procedure 14(b).

We conclude that the trial court erred by failing to grant Defendant's motion to sever the offenses. However, we conclude that the error was harmless. Our supreme court has held that errors regarding joinder and severance of offenses are "neither structural, requiring an automatic reversal, nor constitutional, which requires reversal unless the error is harmless beyond a reasonable doubt." *Dotson*, 254 S.W.3d at 388. Accordingly, "the burden [is] on the defendant who is seeking to invalidate his or her conviction to demonstrate that the error 'more probably than not affected the judgment or would result in prejudice to the judicial process.'" *State v. Rodriguez*, 254 S.W.3d 361, 372 (Tenn. 2008) (quoting Tenn. R. App. P. 36(b)). Judgments "shall not be set aside unless, considering the record as a whole, error involving a substantial right more probably than not affected the judgment." *Dotson*, 254 S.W.3d at 388.

Defendant surmises that because the jury was tasked with making "a fine legal distinction" regarding whether the theft was complete before Defendant pulled out his gun, the jury's "willingness to focus on such subtleties may well go out the window. . . ." We conclude, however, that severance would not have affected the outcome of this case in light of the abundance of evidence of Defendant's guilt of each offense. Defendant is not entitled to relief on this issue.

Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence to support his two convictions for aggravated robbery because, he argues, the evidence showed that the thefts were complete before Defendant displayed a gun. Defendant does not challenge his other convictions. The State argues that the proof showed that Defendant used a firearm to evince his intent to deprive the victims of their property, establishing the elements of aggravated robbery. We agree with the State.

"Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that

the evidence was legally insufficient to sustain a guilty verdict." *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009) (citing *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992)). Appellate courts evaluating the sufficiency of the convicting evidence must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see* Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011) (citing *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010)).

Guilt may be found beyond a reasonable doubt where there is direct evidence, circumstantial evidence, or a combination of the two. *State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005). The standard of review for sufficiency of the evidence "'is the same whether the conviction is based upon direct or circumstantial evidence.'" *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *Hanson*, 279 S.W.3d at 275). The jury as the trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses' testimony, and reconcile all conflicts in the evidence. *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn. 2008) (citing *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)). Moreover, the jury determines the weight to be given to circumstantial evidence, and the inferences to be drawn from this evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury. *Dorantes*, 331 S.W.3d at 379 (citing *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006)). When considering the sufficiency of the evidence, this Court "neither re-weighs the evidence nor substitutes its inferences for those drawn by the jury." *Wagner*, 382 S.W.3d at 297 (citing *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)).

Aggravated robbery is a robbery accomplished through the use of a deadly weapon. T.C.A. § 39-13-402(a)(1). A person commits robbery who intentionally or knowingly obtains or exercises control over property without the owner's effective consent by violence or by putting the person in fear. T.C.A. §§ 39-13-401(a), 39-39-14-103(a).

Defendant argues that he did not use a deadly weapon until after the thefts were complete. In *State v. Henderson*, 531 S.W.3d 687, 698 (Tenn. 2017), the Tennessee Supreme Court identified the specific point in time when a robbery is complete:

> [W]e hold that a robbery accomplished with a deadly weapon is complete once the accused has completed his theft of all the property he intended to steal. If the victim suffers serious bodily injury during the commission of the robbery, the offense may constitute especially aggravated robbery. It is

> appropriate to consider the accused's conduct and intent when determining whether the underlying theft has been completed.

Id. at 698.

Defendant argues the thefts were complete before he produced a gun. He asserts that when the victims handed their property to him to examine, he "had no intention of paying for or returning the phones[,]" and therefore, Defendant exercised control over the victims' property without their effective consent. We disagree.

In *State v. Owens*, our supreme court held that the violence or fear element of robbery must precede or occur contemporaneously with the taking of the property. 20 S.W.3d 634, 641 (Tenn. 2000). The defendant in that case took an article of clothing from a store and fled without paying for it. A store employee chased the defendant for several blocks before the defendant dropped the clothing and brandished a box cutter. The court rejected the continuous offense theory under which robbery is defined to extend to situations in which force is used after the taking, such as to retain property or to facilitate escape. *Id*. at 640-41. The court vacated the defendant's robbery conviction and modified it to a conviction for theft.

In *State v. Swift*, applying the rule announced in *Owens*, our supreme court reversed the defendant's aggravated robbery conviction, holding that the taking was complete before the defendant's use of violence or fear where the defendant removed videogames from their cases and put them in his pants several minutes before he walked toward the store exit and swung a knife at store employees who attempted to stop him. 308 S.W.3d 827, 831 (2010). In so holding, the court addressed the State's argument that "the taking was not complete until the defendant attempted to exit the store without paying for the games because Best Buy consents to its customers holding merchandise while they are in the store." The court noted, however, that the defendant did not simply hold the merchandise while inside the store, but rather removed them from their cases and concealed them in his pants. *Id*.

Here, the victims consented to Defendant's holding their property for the purpose of examining the condition of the items being sold. Unlike in *Owens* and *Swift*, Defendant had taken no action to complete a taking of the property until he produced a gun. The thefts were completed contemporaneously with Defendant's producing a gun and his leaving without paying for the items he was holding.

The evidence was sufficient to support Defendant's aggravated robbery convictions. He is not entitled to relief on this issue.

Conclusion

Based on the foregoing analysis, we affirm the judgments of the trial court.

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TIMOTHY L. EASTER, JUDGE